

Dato' Ting Check Sii v Galaxy Grip Sdn Bhd & Ors

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HIGH COURT (KUCHING) — ORIGINATING PETITION NO 26-05 OF
2005-II

HAMID SULTAN JC

26 SEPTEMBER 2007

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*Companies and Corporations — Winding up — Petition — Petition under s 181 —
Allegations of oppressive conduct by petitioner against the respondents — Whether
majority shareholder can avail themselves of remedy under s 181 — Companies Act 1965
s 181*

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*Companies and Corporations — Winding up — Petition — Petition under s 181 —
Whether complaints outside of ambit of s 181 — Whether matters of commercial or
management decisions*

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The petitioner who is the majority shareholder in the first respondent initiated a petition pursuant to s 181 of the Companies Act 1965, sought various declarations and an injunctive relief. Essentially, the petitioner complained that the respondents had attempted to remove him as a director of the first respondent and that the Form 32A share transfer form purportedly transferring the petitioner's entire 55% shareholding in the first respondent to one Eleanor Ong for a nominal consideration of RM55 was never bargained with or agreed by the petitioner. The petitioner also complained that he had no knowledge nor did he gave his consent as director and majority shareholder of the first respondent to enter into a development agreement dated 4 January 2005 between the first respondent and the fourth respondent.

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Held, dismissing the petition:

- (1) It is untenable in a company law jurisprudence to say that the minority can oppress the majority unless the majority has assigned off their rights and interest to the minority. In such circumstances, s 181 will be of no avail to the majority who has voluntarily relinquished their rights. The relief sought by the petitioner is not one sustainable under s 181 remedies (see para 2).
- (2) In respect of the petitioner's complaint as to ownership and transfer of the shares, it is outside the ambit of s 181 because it does not relate to the conduct of the affairs of the company or acts of the first respondent company. In any event, dispute as to transfer of shares are not matters which can be said to be an unfair conduct of the company's affairs (see para 9).
- (3) In respect of the petitioner's complaint as to the development agreement, it is outside the ambit of s 181 because the development agreement, and other related transactions, are matters of commercial and management decisions of

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- A the first respondent company which are not 'oppressive', 'in disregard of', 'unfairly discriminates against' or 'prejudicial' to the alleged interest of the petitioner as member (see para 10).
- (4) The development agreement and the memorandum of charge were transactions entered into between the first respondent company with the fourth and fifth respondents, and were matters of commercial and management decisions of the first respondent company (see para 11).
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[Bahasa Malaysia summary]

- C Pempetisyen yang merupakan pemegang saham majoriti dalam responden pertama yang telah memulakan petisyen menurut s 181 Akta Syarikat 1965, memohon pelbagai deklarasi dan juga relief injunksi. Pada dasarnya, pempetisyen mengadu bahawa responden-responden telah membuat cubaan untuk mengeluarkannya sebagai pengarah responden pertama dan bahawa Borang 32A borang pindahmilik saham berupa pemindahan keseluruhan 55% saham-saham dalam responden pertama kepada seorang Eleanor Ong untuk balasan nominal RM55 yang tidak pernah ditawarkan atau dipersetujui oleh pempetisyen. Pempetisyen juga mengadu bahawa beliau tidak mempunyai pengetahuan ataupun memberikan kebenaran sebagai pengarah dan pemegang saham majoriti untuk responden pertama memasuki perjanjian pembangunan bertarikh 4 Januari 2005 antara responden pertama dan responden keempat.
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Diputuskan, menolak petisyen:

- F (1) Ia tidak dapat dipertahankan dalam jurisprudens undang-undang syarikat bagi mengatakan bahawa minoriti boleh menindas majoriti melainkan majoriti telah meletak hak-hak mereka dan kepentingan kepada minoriti. Dalam keadaan tersebut, s 181 tidak akan terpakai kepada majoriti yang telah secara sukarela melepaskan hak-hak mereka. Relief yang dipohon oleh pempetisyen adalah tidak dapat dipertahankan di bawah remedi-remedi s 181 (lihat perenggan 2).
- G (2) Berkenaan dengan aduan pempetisyen terhadap pemilikan dan pindahmilik saham-saham, ia adalah di luar bidang kuasa s 181 kerana ia tidak bersangkutan dengan perjalanan hal ehwal syarikat atau tindak-tanduk syarikat responden pertama. Dalam mana-mana keadaan, pertikaian berkenaan pindahmilik saham-saham adalah bukan perkara yang boleh dikatakan sebagai kelakuan tidak adil dalam hal ehwal syarikat (lihat perenggan 9).
- H (3) Berkenaan dengan aduan pempetisyen terhadap perjanjian pembangunan, ia adalah di luar bidang kuasa s 181 kerana perjanjian pembangunan, dan urusan-urusan berkaitan lain, adalah perkara berkaitan keputusan-keputusan komersial dan pengurusan syarikat responden pertama yang bukan 'menindas', 'tidak mempedulikan', 'secara tidak adil telah mendiskriminasikan' atau 'prejudis' kepada kepentingan yang dikatakan oleh pempetisyen sebagai ahli (lihat perenggan 10).
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- (4) Perjanjian pembangunan dan memorandum gadaian adalah urusan-ususniaga yang dimasuki antara syarikat responden pertama dengan responden-responden keempat dan kelima, dan adalah perkara-perkara berkaitan keputusan-keputusan komersial dan pengurusan syarikat responden pertama (lihat perenggan 11).]

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Notes

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For cases on petition, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1321–1456.

Cases referred to

Dato' Ting Check Sii v Datuk Haji Mohammad Tufail Bin Mahmud & Ors Kuching High Court CWU–28–32 of 2006–II (refd)

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Dato' Ting Check Sii v Datuk Haji Mohammad Tufail bin Mahmud & Anor Kuching High Court Originating Petition No 26–05 of 2006–II (refd)

Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433 (refd)

Unisoft Group Ltd (No 3), Re [1994] 1 BCLC 609 (refd)

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Legislation referred to

Companies Act 1965 s 181

George Lo Kuin Fah (James Kuin Chuan & Ting Cheng Ching with him) (George Lo and Partners) for the petitioner

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Sim Hui Chuang (Lim Lip Sze with him) (Reddi & Co) & Willian Yeo (JM Lim & Co) for first, second and third respondents.

Albert Tang Yew Liong (Chew Jugah Wan Ullok & Co) for the fourth and fifth respondents.

Hamid Sultan JC:

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[1] This is my judgment in respect of the petitioner's petition, encl 3 under s 181 of the Companies Act 1965 ('CA 1965') and my judgment for the following enclosures namely: encl 142, the notice of appeal of the fifth respondent against the decision of the learned deputy registrar who dismissed the fifth respondent's application to strike out the petition and encl 139, the notice of appeal of the fourth respondent.

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[2] At the outset, after having perused the petition, I take the view that it is unusual for the petitioner who is a majority shareholder of the first respondent to initiate a petition under s 181 which is commonly understood to be a remedy for minority shareholders who are oppressed by the majority. It is untenable in a company law jurisprudence to say that the minority can oppress the majority unless the majority has assigned off their rights and interest to the minority. In such circumstances, s 181 will be of no avail to the majority who has voluntarily relinquished their rights. Further, I note the relief sought by the petitioner is not one sustainable under s 181 remedies. The reliefs the petitioner is seeking in its original form read as follows:

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- A** (a) a declaration that the development agreement dated 14 January 2005 and the irrevocable power of attorney dated 19 January 2005 between the first respondent and fourth respondent is invalid null and void ab initio;
- (b) a declaration that the memorandum of charge dated 25 June 2005 in favour of the fifth respondent in respect of the land situated at Piasau, Miri containing an area 2.455 hectares described as Lot 2339 Block 4 Miri Concession Land District, is invalid null and void ab initio;
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- (c) consequently, an order that the said memorandum of charge dated 25 June 2005 be removed from the document of title for Lot 2339 Block 4 Miri Concession Land District and the Registrar of Lands & Surveys Department be directed to correct or cancel the entry of the memorandum of charge from the Register and the issue document of title;
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- (d) an injunction to restrain the fourth respondent by its servants or agents from carrying out any further development or construction works on Lot 2339 Block 4 Miri Concession Land District;
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- (e) an injunction to restrain the first and fourth respondents from dealing in or selling the said land or any part thereof;
- (f) an order that the second and third respondents be restrained from conducting the affairs of the first respondent unless such affairs have been authorised by a duly convened meeting of directors of the first respondent;
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- (g) an order that the first respondent is discharged and free of all liabilities to the fifth respondent;
- (h) an order directing the second, third, fourth and fifth respondents to account for and pay compensation to the first respondent for all loss and damage suffered by the first respondent in a sum to be assessed by this court;
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- (i) interest at such rate and for such period as this court deems fit upon any monies held due and payable;
- (j) costs;
- G**
- (k) such further or other order, remedy or relief which this court is of the opinion is necessary to be made or given with a view to remedying the matters complained of in this petition.

H I would have thought for the reasons stated above that the petition ought to have been dismissed in limine, nevertheless I have taken the safer approach to consider the complaint of the petitioner.

I [3] On the issue of oral evidence relating to the petition, I have dealt with the same in the case of Kuching High Court CWU-28-32 of 2006-II *Dato' Ting Check Sii v Datuk Haji Mohammad Tufail bin Mahmud & Anor* in my judgment delivered on 26 July 2007 and the relevant part is reproduced:

4. The hearing of the petition commenced by the petitioner giving evidence. I realised during the course of hearing the petition that the respondents were attempting to restate what was in the affidavit. I informed them that s 218(1)(i) petition is meant to be petition to be tried by affidavits. Only in exceptional cases that too with the permission

of court, can the deponent be cross-examined. I have informed the parties that I will give my grounds in my judgment after hearing why oral evidence in principle should not be allowed in hearing a s 218 petition. My reasons are as follows:

- (a) In *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 Lord Temple Man sitting on the Privy Council observed:

The Company's (Winding UP) Rules 1972 provide for winding up petition to be verified by affidavit and for affidavits in opposition and reply to be sworn and filed. This procedure was followed in the present case. In civil proceedings the trial judge has no power to dictate to a litigant what evidence he should tender. In winding up proceeding the trial judge cannot refuse to read affidavits which have been properly sworn, filed and produced to him unless some opposing party has applied for the attendance for cross-examination of the deponent and that application has been granted and the deponent does not attend. The court cannot give a direction about evidence unless one of the litigants desires such direction to be made. Of course a judge may indicate to a petitioner that unless he calls oral evidence or applies to cross-examine the deponents of the opposition so as to prove a disputed fact, his petition is likely to fail. The judge may equally indicate to a respondent that unless he calls oral evidence or applies to cross-examine the petitioner's deponents for the purpose of disproving an allegation made by the petitioner is likely to succeed. At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts. On behalf of the respondent in the present case it was submitted that the trial judge paid some attention to the petitioner's disputed allegations of an express assurance but the board is satisfied that the judge confined his consideration of the petition to the undisputed facts and rightly concluded that the petitioner had made out his case that it was just and equitable to wind up the company.

- (b) *Tahansan's* case is not authority for the proposition that oral evidence must be given for purpose of hearing the petition. In fact the law which governs the mode of trial in a winding up petition is set out in s 221(2) of CA 1965 which states as follows:

(2) The court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition.

- (a) direct that any notices be given or any steps taken before or after the hearing of the petition;
- (b) dispense with any notices being given or steps being taken which are required by this Act, or by the rules, or by any prior order of the court;
- (c) direct that oral evidence be taken on the petition or any matter relating thereto;
- (d) direct a speedy hearing or trial of the petition or any issue or matter;
- (e) allow the petition to be amended or withdrawn; and
- (f) give such directions as to the proceedings as the court thinks fit.

- A** (c) Any party who intends to adduce oral evidence at the trial of the hearing must make an application under s 221 of CA 1965 and the court must direct to do so. Thus, it is not a substantive right to adduce oral evidence.
- (d) There is no inflexible rule or practice prohibiting the adducing of oral evidence or the cross-examination of the deponents of affidavits in winding up applications. Where necessity suggests or expediency requires, it is open to the Judge trying winding up proceedings, to allow oral evidence. Where the application for calling oral evidence is not only belated but is intended to retard and delay the progress of the winding up application the court must refuse to exercise the discretion to allow oral evidence, as in winding up petition, expedition is absolutely necessary, (see *Veeramachineni Seethiah v Bode Venkatasubbiah & Ors* AIR (36) 1949 Madras 675).
- B**
- C** (e) In *Chappel House Colliery & Co* [1883] 24 ChD 259, it was stated that the court will not as a rule order a petition to stand over for a long period as it would not be just to the company. To expedite the hearing of winding up proceedings is not only in the interest of the company but also an element of public policy in regard to commercial morality to dispose of the petition early (see *Veeramachineni's* case).

D BRIEF FACTS AS PER THE PETITION

[4] The petition, affidavits, exhibits, submissions run to more than 400 pages. In crux, the petitioner who is a majority shareholder complains as follows:

- E** (i) the first respondent company is an investment holding company and its only asset is a parcel of land (the land). The first respondent does not engage in any trading activities. Since the date of incorporation of the first respondent, the petitioner has been responsible for funding the annual audit fees and other expenses of the first respondent. As at 31 December 2003, the first respondent is liable to the petitioner for the sum of RM20,945 being the expenses aforesaid;
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- (ii) on or about 28 June 2005, the petitioner received a notice of extraordinary general meeting (EGM) dated 17 June 2005 issued by the third respondent notifying the petitioner of an EGM to be held on 14 July 2005 to consider a resolution to remove the petitioner as director and to appoint one Eleanor Ong as director in his place. The notice of EGM was issued upon the requisition of Eleanor Ong claiming to hold 60% of the issued capital of the first respondent. Eleanor Ong's requisition was also dated 17 June 2005;
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- (iii) by virtue of this notice of EGM and as a result of enquiries made by the petitioner and his solicitors, the petitioner has subsequently discovered that the second respondent acting in collusion with or otherwise abetted by the third respondent and Eleanor Ong has attempted to transfer the petitioner's entire shareholding in the first respondent to Eleanor Ong for a nominal consideration of RM55 only;
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- (iv) further and in pursuance of the purported transfer, Eleanor Ong acting in collusion with or otherwise abetted by the second and third respondents have attempted to remove the petitioner as a director of the first respondent and appointed herself as director in place of the petitioner;
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- (v) the purported form 32A share transfer form submitted by Eleanor Ong to the third respondent is an unattested transfer form of shares purporting to transfer

the petitioner's entire 55% shareholding in the first respondent to Eleanor Ong for a nominal consideration of RM55 only. The petitioner has not at any time bargained with or agreed to sell or part with his entire shareholdings or any part thereof in the first respondent company to Eleanor Ong for RM55 or for any sum at all. This share transfer was purportedly approved by a circular resolution of the board of directors of the first respondent on 26 May 2005. The petitioner has no knowledge nor has he ever agreed to the purported circular resolution;

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- (vi) the second and third respondents had refused and denied the petitioner access to the secretarial files, statutory registers and accounting records of the first respondent, despite repeated requests until after the Originating Summons was filed. It was only on 10 August 2005, after the withdrawal of the Originating Summons, that the respondents through their solicitors produced the minutes book and statutory register for the petitioner's inspection at the chambers of their advocates. Photocopies of the relevant pages thereof were then taken by the petitioner. The purported form 32A and the purported circular resolution were not found in the records of the minutes book;

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- (vii) the petitioner has also discovered that, without his knowledge or consent as a director and majority shareholder of the first respondent, the second and third respondents have, in collusion with the fourth respondent, purportedly caused or procured the execution of a development agreement dated 4 January 2005 (the development agreement) between the first respondent and the fourth respondent, whereby the first respondent purportedly appointed the fourth respondent to be the sole and exclusive developer to develop the land at the fourth respondent's own costs and expense in exchange for four units of double-storey semi detached houses and two units of double storey detached houses to be constructed on the land by the fourth respondent;

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- (viii) the petitioner, as one of only two directors of the first respondent, was not consulted nor did he give his consent as director for any board resolution to be passed to authorize the affixing of the common seal of the first respondent to the abovementioned two documents;

- (ix) the petitioner says that the bargain struck between the second and fourth respondents and embodied in the development agreement and power of attorney, is manifestly unfair and unjust to the first respondent. The terms thereof were grossly advantageous to the fourth respondent at the expense of the first respondent and the reasons are as follows:

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- (a) in a normal 'construct and share' development agreement in an arms-length transaction on fair commercial terms between a landowner and developer, the sharing ratio is normally on a 1/3: 2/3 basis, viz, the landowner will be entitled to one-third (1/3) of the units constructed by the developer on the landowner's land with all development expenses borne by the developer;
- (b) the first respondent ought to be entitled to two units of double storey detached houses and 14 units of double storey semi-detached houses out of the 48 units to be constructed on the land;

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- A** (c) the bargain struck between the second and fourth respondents has caused the first respondent to be unlawfully and unfairly deprived of 10 units of double storey semi-detached houses with an aggregate value of approximately RM4,500,000 and the fourth respondent to unlawfully and unfairly profit thereby;
- B** (d) the inequitable deal also unfairly allowed the fourth respondent to charge the first respondent's land to the fifth respondent for a loan of RM2,000,000 taken by the first respondent;
- (e) the said charge has wrongfully and unfairly encumbered the first respondent's land and placed it in jeopardy of foreclosure proceedings with no corresponding benefit to the first respondent;
- C** (f) no other offers were sought nor tender called to seek the best possible terms for the development of the Land;
- (g) the transaction was neither arms-length nor was it done in a transparent manner in that the terms were agreed solely between the second, third and fourth respondents without the knowledge or approval of the board of directors or shareholders of the first respondent in general meeting.
- D** (x) in the light of the matters set out above, the petitioner contends that the affairs of the first respondent have been conducted by the second and third respondents, in collusion with or otherwise assisted, aided and/or abetted by the fourth and/or fifth respondents, in a manner oppressive to the petitioner or in disregard of his interests as a shareholder of the first respondent.
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- F** [5] The third respondent disputing the petitioner's allegation says that (i) he is the secretary of the first respondent and has not colluded with the second respondent to commit fraud against the petitioner. (ii) the second respondent had instructed him to execute the development agreement and the power of attorney for and on behalf of the first respondent with the fourth respondent for the sole benefits of the first respondent, and he executed them as he knew that the second respondent was holding 45 shares registered in his name and the beneficial owner of the 55 shares held by the petitioner as his nominee/trustee for the first respondent.
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- [6] The second respondent's version can be summarised as follows:
- (i) the petitioner (although registered as holder of the 55 shares) is not the owner of the shares. He is a mere or bare trustee of the shares and is not entitled to any benefit in respect of the shares;
- H** (ii) the facts relevant to the primary issue are:
- (a) before the first respondent was incorporated, there was an oral agreement between the petitioner and the second respondent that the petitioner was to hold whatever shares in the first respondent as trustee/nominee on the following terms:
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- (i) the second respondent shall be at liberty to effect the transfer of shares held by the petitioner to any third party with no consideration; A
 - (ii) management and control of the first respondent shall be the second respondent's sole responsibility as executive chairman, including applications for the land; B
 - (iii) the petitioner would be appointed a director until such time that the second respondent would exercise the transfer of shares to new nominee.
 - (b) the second respondent then instructed the company secretary, the third respondent, to prepare a form of transfer of securities, ie, Form 32A and a circular resolution in respect of 55 shares in the first respondent and with the petitioner's name inserted as transferor; C
 - (c) the petitioner executed the undated transfer Form 32A which had name of the first respondent company, the number of shares and the petitioner's name and the undated circular resolution of the board of directors of the first respondent. The transfer Form 32A and the circular resolution were signed in front of the second respondent; D
 - (d) after the transfer Form 32A and circular resolution were signed by the petitioner, they were handed over by the second respondent to the third respondent for safe keeping. E
 - (iii) therefore, right from the start, the petitioner did not hold any beneficial interest in the shares. He was expressly holding the shares as a trustee. As a mere trustee he has no beneficial interest, there is no question of the petitioner having any real interest which is 'oppressed', 'disregarded', 'unfairly discriminated' or 'prejudiced' or upon which this court should grant any relief under s 181. F
- [7] I have read the petition, affidavits and submission in detail. I am inclined to agree with the submission of the first to third respondents that the petition ought to be dismissed. My reasons are as follows: G
- [8] In respect of the petitioner's complaint as to ownership and transfer of the shares, I take the view it is outside the ambit of s 181 because it does not relate to the conduct of the affairs of the company or acts of the first respondent company. In *Re Unisoft Group Ltd (No 3)* [1994] 1 BCLC 609, Harman J said at p 623: H
- It is important to remember that shareholders' rights to deal with or vote their shares are separate from the rights of the company as a corporate entity and shareholders' relationships with it. Shareholders are entitled to sell their shares, to vote their shares, to take any course they like in general meeting without regard to any other person's rights or position. In my judgment the law is that a shareholder may act with malice in voting his shares against a particular resolution and there can be no objection to that, just as in *Bradford Corp v Pickles* [1985] AC 587, a landowner acted on his own land with malicious intent to harm his neighbour, but was not in breach of any legal obligation. Of course, if a trustee holds shares on trust, he may have obligations to his beneficiaries which cause him to exercise the rights I

A attached to those shares in the interest of the beneficiaries, but that is nothing whatever to do with an individual's position as a shareholder and his relationship with his co-shareholders.

B In my judgment, it is vitally important to hold that shareholders' disputes concerning dealings with their shares are not the same as unfair conduct of the company's business. Shareholders must be kept distinct from the company as far as their private position as shareholders is concerned.

C It is of course obvious that a company may act or conduct itself in a manner affecting a shareholder's rights in respect of his shares, for example the board may refuse to sanction a transfer of shares for improper reasons. The action of the board is conduct of the affairs of the company and so, if damage is alleged, may raise the ground of 'unfair' prejudice, and a petition under s 459 [of the UK Companies Act 1985] may be presented to the court. Further, a shareholder by exercising his own private right to vote his shares may cause the company to act by the passing of some resolution in general meeting, in matter alleged to be unfairly prejudicial to some members. Again it is not the act of the shareholder in voting that will found a petition but the result of that act if it produces action, or inaction, the company. In my judgment the vital distinction between acts or conduct of the company and the acts or conduct of the shareholder in his private capacity must be kept clear. The first type of act will found a petition under s 459; the second type will not.

D It is only when a shareholder is affected qua member of the company by the company's action which causes damage that s 459 comes into operation. There is a clear and important distinction, in my judgment, to be drawn between actions by shareholders affecting other shareholders directly and actions by the company affecting shareholders. The whole of these paragraphs in the points of claim right on to para 23 are all, in my view, about shareholders' activities and are none, in my view, about activities of the company. Upon that basis they raise no cause of action within O 18 r 19(a) and they are not proper to be pleaded.

E [9] In the present case, the petitioner is not, in the petition, suing or seeking any relief in respect of the shares. Moreover, the petitioner has commenced a writ action ('writ action') in respect of the shares. The writ action specifically deals with the issue of trust/nominee and ownership and is the appropriate forum for that issue. It is pending trial. In any event, dispute as to transfer of shares are not matters which can be said to be an unfair conduct of the company's affairs.

F [10] In respect of the petitioner's complaint as to the development agreement, it is outside the ambit of s 181 because the development agreement, and other related transactions, are matters of commercial and management decisions of the first respondent company which are not 'oppressive', 'in disregard of', 'unfairly discriminates against' or 'prejudicial' to the alleged interest of the petitioner as member.

G [11] The development agreement and the memorandum of charge are transactions entered into between the first respondent company with the fourth and fifth respondents, and are matters of commercial and management decisions of the first respondent company. In Kuching High Court Originating Petition No 26-05 of 2006-II *Dato' Ting Check Sii v Datuk Haji Mohammad Tufail bin Mahmud & Ors*, at para 13 I have stated as follows:

H Section 181 relief is not relevant in cases where there is disagreement to managerial decisions or policy decisions. Such conduct does not necessarily constitute oppression or disregard of

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a member's interests. Section 181 remedy is only applicable to case where the oppressive conduct affects the petitioning member qua member. The oppression complained of must be continuing at the time the action is brought.

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And in the said judgment, I have stated:

(k) ... Section 181 deals with a member's personal right to be treated fairly. The injury must be an injury done to himself and not the ninth respondent. If the injury is to the ninth respondent, the proper complainant is the ninth respondent itself and it cannot be the petitioner, (see *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354). The court will not ordinarily interfere with the internal management of the company which are being managed honestly and in accordance with law, (see *Re Bright Pine Mitts Pty Ltd* [1969] VR 1002). If the acts in question affect the complainant in some capacity other than as member, he has no right to maintain an action and seek remedy under s 181 of CA 1965, (see *Re HR Harmer Ltd* [1958] 3 All ER 689).

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(l) ...The petitioner will have no cause of action and remedy if he cannot demonstrate the 'affairs of the company' are being conducted in a manner oppressive to themselves as minority shareholders. ...

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[12] I have dealt with this area of law in detail on 26 July 2007 in the case of OP No 26–05 of 2006–II *Dato' Ting Cheek Sii v Datuk Haji Mohammad Tufail bin Mahmud & Ors* and the relevant part reads as follows:

It is trite that s 181 of the CA 1965 gives the court wide powers to remedy oppression and in the alternative to order winding up of the company. Though the discretion of the court is very wide as a matter of policy, the court has to exercise its discretion with utmost care and wisdom, failing which it will stand as a precedent for any person unhappy with the management of the company to file frivolous petition to frustrate the business of the company and thereby cause loss and damage to the company. The court will rarely want to substitute the managerial decision of the company for every difference in opinion of shareholders on the ground that the said decision is oppressive. When exercising the discretion the court must consider inter alia: (i) the need to respect the majority decision of the members to manage the affairs of the company within the rights conferred under the law to be read with the Memorandum and Articles of Association of the Company; (ii) the need to protect the minority from any oppressive conduct which does not subscribe to the concept of corporate accountability and transparency; (iii) to provide only the minimum remedy justifiable to the actual needs of the occasion unless otherwise warrants to ensure the productivity of the company towards social and economic growth are not hampered; (iv) not to provide the remedy if the relief sought is not appropriate or the conduct of the petitioner will disqualify the petitioner from proceeding against the company.

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A member of the company will be able to bring himself within the section if he can show that the value of his shareholding in the company has been seriously diminished or at least seriously jeopardised by reason of a course of conduct on the part of those persons who have de facto control of the company, which has been unfair to the member concern. The test is objective, ie, whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner's interests. (*Re RA Noble & Sons (clothing) Ltd* [1983] BCLC 273; *Re Ringtower Holding Plc* [1989] 5 BCC 82).

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The change in the appointment of managing director or directors of the company done according to law and articles of association and/or shareholders agreement cannot be a subject matter of challenge under this provision. In *Re Jeremyn Street Turkish Baths Ltd* [1970] 1 WLR 1042 (CA,) Buckley J observed:

- A** In our judgment, oppression occurs when shareholders, having a dominant power in a company, either (1) exercise that power to procure that something is done or not done in the conduct of the company's affairs or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs; and when such conduct is unfair or, to use the expression adopted by Viscount Simonds in *Scottish Co operative Wholesale Society Ltd v Meyer* [1959] AC 324, 342 'burdensome, harsh and wrongful' to the other members of the company or some of them, and lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs: see *Scottish Co operative Wholesale Society Ltd v Meyer* and in *Re HR Harmer Ltd* [1959] 1 WLR 62. We do not say that this is necessarily a comprehensive definition of the meaning of the word 'oppressive' in s 210, for the affairs of life are so diverse that it is dangerous to attempt a universal definition. We think, however, that it may serve as a sufficient definition for the present purpose. Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing, act or attitude on the part of the oppressor. If a director of a company were to draw remuneration to which he was not legally entitled or in excess of the remuneration to which he was legally entitled, this might no doubt found misfeasance proceedings or proceedings for some other kind of relief, but it would not of itself amount to oppression. Nor would the fact that the director was a majority shareholder in the company make any difference, unless he had used his majority voting powers to procure or retain the remuneration or to stifle proceedings by the company or other shareholders in relation to it.

- E** In *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227, Lord Wilberforce opined:

- F** Secondly, for the case to be brought within s 181(1)(a) at all, the complaint must identify and prove 'oppression' or 'disregard'. The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (*Elder v Elder & Watson Ltd* [1952] SC 49): their Lordships would place the emphasis on 'visible'. And similarly 'disregard' involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson v Drysdale* [1925] SC 311, 315). Neither 'oppression' nor 'disregard' need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.

- I** [13] For reasons stated above, I take the view that the petitioner has not made out a case under s 181 CA 1965 and, in consequence, I dismiss the petition with costs to the respondents. The getting up fees for the first to third respondents jointly shall not exceed RM100,000. The getting up fees for the fourth respondent and fifth respondent each shall not exceed RM25,000 each. If costs cannot be agreed the parties are at liberty to tax their costs.

[14] Since I have dismissed the petition, encls 142 and 139 have become academic and, in consequence, it is appropriate for both enclosures to be struck out with no order as to costs here and also before the learned deputy registrar. I hereby order so.

Petition dismissed.

Reported by Brendan Navin Siva

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